

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

JENNY R.,

Plaintiff,

Civil Action No.
5:18-CV-1451 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

OLINSKY LAW GROUP
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Syracuse, NY 13202

HOWARD D. OLINSKY, ESQ.
MARY K. McGARIGAL, ESQ.

FOR DEFENDANT

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DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on March 10, 2020, during a telephone conference conducted on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and not is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

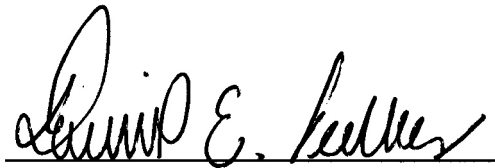
ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

3) The matter is hereby REMANDED to the Commissioner of Social Security for further proceedings before a newly assigned Administrative Law Judge, consistent with the court's decision.

4) The clerk is respectfully directed to enter judgment, based upon this determination.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: March 12, 2020
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
JENNY R. R.,

Plaintiff,

vs.

5:18-CV-1451

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on March 10, 2020, at the James
Hanley Federal Building, 100 South Clinton Street,
Syracuse, New York, the HONORABLE DAVID E. PEEBLES,
United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: OLINSKY LAW GROUP
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BY: MARY K. MCGARIGAL, ESQ.

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*Jodi L. Hibbard, RPR, CSR, CRR
Official United States Court Reporter
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1 (In Chambers, Counsel present by telephone.)

2 THE COURT: Plaintiff has commenced this proceeding
3 pursuant to 42 United States Code Section 405(g) to challenge
4 the Commissioner's determination that she was not disabled at
5 the relevant times and therefore ineligible for the
6 Disability Insurance benefits sought.

7 The background is as follows: Plaintiff was born
8 in August of 1965, she's currently 54 years old; she was 52
9 at the time of the hearing in this matter and 47 at the time
10 of the alleged onset of her disability in May of 2013.
11 Plaintiff is 5 foot 6 inches in height and weighs between 200
12 and 212 pounds. She has been in foster care most of her
13 life. Plaintiff has six children. In December of 2017, they
14 ranged in age from 20 to 31, although only the 20-year-old
15 lives with the plaintiff. Plaintiff lives with her
16 20-year-old daughter, she was 20 in December of 2017, in a
17 second floor apartment in Syracuse. She was homeless for a
18 period of time. She is separated from her husband.
19 Plaintiff is right-handed. She left school during or after
20 ninth grade, although she can read and write and can do basic
21 math. Plaintiff has never had a driver's license. She takes
22 the bus and gets rides when necessary. She testified at
23 page 33 she leaves the house approximately two times per
24 week.

25 Plaintiff last worked in November of 2011. She

1 worked in the past as a cashier, and as a library page and
2 later a library clerk.

3 Physically, plaintiff suffers from a residual
4 spinal stenosis and lumbar back issue which has also resulted
5 in numbness and pain in her leg. She was admitted to Crouse
6 Hospital on July 1 and underwent surgery on July 2, 2015 by
7 Dr. Ross Moquin although he's been referred to as Dr. Ross
8 occasionally. The surgery was an L2-S1 posterior arthrodesis
9 with laminectomies for stenosis at L2, L3, L4, L5, and S1.
10 Plaintiff underwent MRI, or magnetic resonance imaging,
11 testing before and after the surgery, before on June 29,
12 2015, that's at 297, 298, and after on July 5, 2015, that's
13 at 296 and 297. Plaintiff testified that she uses a back
14 brace and walker. She can't stand straight. She has
15 suffered from incontinence. Plaintiff also suffers from
16 obesity, asthma, and headaches.

17 Mentally, plaintiff has been variously diagnosed as
18 having suffered from post-traumatic stress disorder,
19 attention deficit disorder, and attention deficit and
20 hyperactivity disorder and an anxiety disorder. She was
21 institutionalized at some point while she was a teen. She
22 underwent treatment and counseling at Liberty Resources in
23 Brownell Center for approximately two years under Dr. David
24 Kang, a psychiatrist, and Nurse Practitioner Heather
25 Henderson. Records of treatment from November 2012 to 2016

1 are in evidence. She was dismissed from that program for --
2 based on attendance issues. She has been in the past
3 assigned Global Assessment of Functioning or GAF scores of
4 between 45 and 48, that's at 256 and 263 of the
5 administrative transcript. Plaintiff has had some emergency
6 room visits since discontinuing treatment for her back.

7 In terms of medications, at various times she has
8 been on Albuterol, oxycodone, hydroxyzine, Klonopin,
9 Adderall, and gabapentin.

10 In terms of the mental conditions, they have
11 resulted in various symptoms including history of cutting
12 herself, flashbacks, anger, anxiety, and stress.

13 The plaintiff has various activities of daily
14 living, testified to at page 48, also at page 437 there is
15 reference to it. She likes to drink coffee, she reads, she
16 listens to music, makes videos, takes care of her daughter,
17 dresses, bathes, cooks, prepares food, cleans, does laundry,
18 and shops. Plaintiff is a smoker, she smokes approximately
19 half pack of cigarettes per day, that's at page 441 of the
20 administrative transcript.

21 Procedurally, plaintiff applied for Title II
22 benefits under the Social Security Act on May 11, 2015,
23 alleging a disability onset date of May 1, 2013. She claimed
24 disability as a result of PTSD and ADD, that's at page 172,
25 I'll note that that predates, the application predates her

1 back surgery and back condition. On December 20, 2017 a
2 hearing was conducted by Administrative Law Judge Gretchen
3 Mary Greisler. Judge Greisler issued a decision on
4 January 25, 2018, finding that plaintiff was not disabled at
5 the relevant times and therefore ineligible for the benefits
6 sought. On October 24, 2018, that became a final
7 determination of the agency when the Social Security
8 Administration Appeals Council denied plaintiff's application
9 for review.

10 In her decision, ALJ Greisler applied the familiar
11 five-step test for determining disability. Before applying
12 that test, she noted that plaintiff was last insured on
13 December 31, 2016.

14 At step one, she found plaintiff had not engaged in
15 substantial gainful activity over the relevant period of
16 May 1, 2013 to December 31, 2016.

17 At step two she concluded that plaintiff suffers
18 from severe impairments that impose more than minimal
19 limitations on her ability to perform work-related functions,
20 including PTSD, ADD, ADHD, migraines, and a spine disorder.

21 At step three, ALJ Greisler concluded those
22 conditions do not meet or medically equal any of the listed
23 presumptively disabling conditions set forth in the
24 Commissioner's regulations, specifically considering Listings
25 1.04, 3.03, 12.11, and 12.15.

1 Plaintiff -- plaintiff's residual functional
2 capacity was next addressed. ALJ Greisler found that she
3 retains the RFC to perform light work with various additional
4 restrictions, both relating to her physical condition and her
5 mental conditions. The RFC is recited at page 17 of the
6 administrative transcript and I won't read it into the
7 record.

8 At step four, the administrative law judge
9 concluded that plaintiff is unable to perform any of her past
10 relevant work as a library page, based on testimony of a
11 vocational expert.

12 Step five, the administrative law judge concluded
13 that if plaintiff were capable of performing a full range of
14 light work, the Medical-Vocational Guidelines set forth in
15 the Commissioner's regulations or the Grids, and specifically
16 Grid Rules 202.17 and 202.10, would direct a finding of no
17 disability. Based on a hypothetical posed to a vocational
18 expert approximating the plaintiff's residual functional
19 capacity, ALJ Greisler found that plaintiff is able to
20 perform work available in the national economy including as a
21 collator operator, a marker, and a cleaner/housekeeper, and
22 therefore was not disabled at the relevant times.

23 As you know, my task is limited to determining
24 whether correct legal principles were applied and the
25 determination is supported by substantial evidence. It is an

1 exacting standard, higher perhaps than the clear error
2 standard as the Second Circuit noted in *Brault v.*
3 *Commissioner*. Substantial evidence of course, we know, is
4 defined as such evidence as a reasonable mind would find
5 sufficient to support a factual conclusion.

6 In her appeal, the plaintiff has raised four
7 essential arguments. She claims that the residual functional
8 capacity finding was not supported. It was crafted by a lay
9 administrative law judge after rejecting all of the available
10 medical opinions based upon their proximity to her surgery.
11 Second, she complains of the ALJ's failure to address
12 Dr. Noia's opinion concerning the moderate to marked ability
13 in handling stress. At step three -- I'm sorry, the third
14 argument is the administrative law judge's alleged failure to
15 address the need for an assistive device, a walker. And four
16 is the argument related to the unconstitutional alleged
17 appointment of ALJ Greisler.

18 I agree with the Commissioner that we have a closed
19 period and it is plaintiff's burden to establish through the
20 RFC and step four points that she was disabled between May 1,
21 2013 and December 13, 2016.

22 Let me take first the argument concerning the
23 Appointments Clause. Plaintiff argues that Administrative
24 Law Judge Greisler, like all of the administrative law judges
25 within the agency, were not properly appointed under

1 Article II, Section 2, Clause [2] of the Constitution which
2 specifically requires that all public ministers, consuls,
3 judges, and other officers of the United States other than
4 those that are provided for in the first sentence of that
5 provision shall be appointed by law, as provided by law, but
6 Congress may by law vest the appointment of such inferior
7 officers, as they think proper, in the President alone, in
8 the courts of law, or in the heads of departments.

9 The argument specifically is that the
10 administrative law judge in this case was not appointed by
11 the court, by the President, or by the Commissioner of Social
12 Security. On July 13, 2018 the President issued an Executive
13 Order concluding that at least some and perhaps all ALJs are
14 officers of the United States and thus subject to the
15 Constitution's Appointment Clause, that was Executive Order
16 Number 13,843, published in 83 Fed. Reg. 32755. Three days
17 later, on July 16, 2018, the Acting Commissioner of Social
18 Security formally appointed the agency's ALJs in order to
19 comply with the Appointments Clause as illuminated by that
20 Executive Order.

21 There doesn't appear to be an argument that the
22 administrative law judge in this case and many others were
23 not properly appointed under the Appointments Clause. The
24 argument really centers around the Supreme Court's decision
25 in *Lucia* which came down in June of 2018, I note while the

1 matter was pending before the Social Security Administration
2 Council, and that case followed an earlier decision of the
3 Supreme Court, *Freytag v. Commissioner* from 1991, involving
4 the Commissioner of Internal Revenue.

5 The question really is whether there was a duty to
6 present the argument to the agency and whether the failure to
7 do so constitutes a waiver of the argument. Unquestionably,
8 the vast majority of cases that have addressed the issue
9 found, have found waiver and have found a duty to timely
10 present the matter to the agency. I in fact found that to be
11 true in *Donna S. K. v. Commissioner of Social Security*, it
12 was Civil Action Number 18-CV-1070, and that was a decision
13 from August of 2019. My reasoning was that *Lucia* really was
14 not new, it should have been anticipated from the Supreme
15 Court's decision earlier in *Freytag*.

16 Another judge of this court, Andrew T. Baxter,
17 another of my colleague magistrate judges, in *Kevin F. v.*
18 *Commissioner of Social Security* reached a similar conclusion,
19 that's found at 2020 WL 247323 from January 16, 2020.

20 As plaintiff has noted, very recently in fact, on
21 January 23, 2020, the Third Circuit dealt with consolidated
22 appeals. One of the appeals was a case that had -- from the
23 Eastern District of Pennsylvania that had gone the other way,
24 *Bizarre v. Commissioner of Social Security*, it was
25 consolidated and the decision was rendered on January 23,

1 2020 under the name *Cirko v. Commissioner of Social Security*,
2 it's reported at 948 F.3d 148 from the Third Circuit. And
3 *Cirko* found no duty to raise the issue before the agency and
4 found no waiver in failing to do so.

5 The decision clearly is not binding on this court,
6 but I found the rationale to be compelling notwithstanding my
7 earlier contrary decision.

8 I note that at least one court in this circuit has
9 followed *Cirko*, that is in *Suarez v. Saul* at 2020 WL 913809
10 from the District of Connecticut, February 26, 2020. There
11 are some other cases that have come down, there is a case
12 from the Northern District of Iowa, *Griffin v. Commissioner*
13 *of Social Security*, 2020 WL 733886, from February 13, 2017
14 that followed the majority and rejected *Cirko*. There is a
15 case from the District of Connecticut, *Streich v. Berryhill*,
16 2020 WL 563373 from February 5, 2020, that came after the
17 Third Circuit's decision in *Cirko* but makes no reference to
18 it. It does, however -- it does, however, follow the
19 majority and not *Cirko*. There are pending appeals apparently
20 in the Eighth Circuit and the Fourth Circuit. I checked this
21 morning and there does not appear to be any decision from
22 those courts.

23 As I indicated, however, I do find the Third
24 Circuit's opinion in *Cirko* persuasive, and so I am going to
25 follow it in this case and conclude that the administrative

1 law judge in this case was not properly appointed, there was
2 a violation of the Appointments Clause of the Constitution
3 and therefore the result is infected and the matter should be
4 remanded to the Commissioner for further consideration. And
5 consistent with the cases that have remanded on this basis, I
6 will direct that the matter be assigned to a different
7 administrative law judge than ALJ Greisler.

8 I do want to make a couple of additional
9 observations concerning the record in this case. In terms of
10 the physical components of the residual functional capacity
11 finding, the administrative law judge discounts virtually
12 every opinion that addresses it. The opinions of Nurse
13 Practitioner Margaret Fisher, the opinions of Dr. Ross
14 Moquin, plaintiff's treating physician, and the doctors,
15 Dr. Ganesh's consultative opinion as being too close to the
16 surgery. Without that, there is no medical opinion in the
17 record that addresses the plaintiff's physical condition
18 prior to the date of last insured. I think that that
19 presents a gap which the administrative law judge was duty
20 bound to fill, and the ALJ was not in a position to
21 substitute her lay opinion for the lacking medical opinions.

22 She addresses plaintiff's failure to obtain
23 treatment but does not consider her explanation of her
24 homelessness as required under SSR 16-3p. It's clear
25 plaintiff underwent physical therapy. There are also

1 subsequent visits to the emergency room where she references
2 continued back pain at 502 and 503 to 507. She relies for
3 this -- and also the rejection of Dr. Noia's opinion
4 concerning stress on activities of daily living without
5 explaining exactly how those activities would translate into
6 the ability to perform work on a sustained basis five days a
7 week for eight hours a day. In terms of Dr. Noia's opinion,
8 the administrative law judge rejected his opinion that
9 plaintiff suffers from moderate to marked limitation in
10 ability to deal with stress, that's at page 437, rejected
11 again based on a wide range of ADLs and Dr. Noia's benign
12 findings without explaining how a consultative exam could
13 gauge the ability to deal with stress.

14 The administrative law judge did not address the
15 factors, the *Burgess* factors of 20 C.F.R. Section 404.1527.
16 Records from the Brownell show plaintiff having cutting
17 behaviors. There is several references to plaintiff's GAF
18 scores of anywhere from 45 to 48, that's at page 256 and 263.
19 A GAF score of 41 to 50 translates to serious symptoms or any
20 serious impairment in social, occupational, or school
21 functioning, as set forth in the DSM-IV. The -- again,
22 there's case law to suggest that merely relying on activities
23 of daily living to discount an acceptable medical opinion is
24 improper, including *Stoesser v. Commissioner of Social*
25 *Security*, 2011 WL 381941, decision from the Northern District

1 of New York, February 3, 2011.

2 I also have some concern about the assistive
3 device. I understand it was not -- it's unclear whether it
4 was medically prescribed, but plaintiff, plaintiff's RFC is
5 for light work with additional limitations. Under 20 C.F.R.
6 Section 404.1567(b), the light work, even though the weight
7 lifted may be very little, a job is in this category when it
8 requires a good deal of walking or standing. In my view, the
9 use of an assistive device should have at least been
10 discussed and the administrative law judge should have
11 outlined why it was rejected. The use of a walker was noted
12 by visiting providers at page 330, 338, at page 426 to 427,
13 it was noted that plaintiff needs an assistive device to keep
14 from falling. Her hearing testimony, page 42, referenced the
15 use of an assistive device, and it would be -- yet the
16 administrative law judge did not indicate why she rejected
17 the need for using an assistive device in the hypothetical
18 posed to the vocational expert.

19 So in sum, I will grant judgment on the pleadings
20 to the plaintiff and, as indicated, vacate the Commissioner's
21 determination and direct that the matter be returned to a
22 different administrative law judge for additional
23 consideration.

24 I have to say I've enjoyed working with both of
25 you, your presentations both on paper and orally were

1 excellent, and I hope you both have a good afternoon. Thank
2 you.

3 MS. MCGARIGAL: Thank you as well.

4 MR. MAKAWA: Thank you, your Honor.

5 (Proceedings adjourned, 12:00 p.m.)

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I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
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District of New York, DO HEREBY CERTIFY that
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the United States.

Dated this 11th day of March, 2020.

/S/ JODI L. HIBBARD
JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter